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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 582

WOOLFORD REALTY COMPANY, INC., PETITIONER,

vs.

J. T. ROSE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 21, 1931

CERTIORARI GRANTED JANUARY 25, 1932

(36,396)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 14, 1932

[Caption omitted]

TRANSCRIPT OF RECORD.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

WOOLFORD REALTY COMPANY, INC.,
Appellant,
versus
At Law.

J. T. ROSE, UNITED STATES COLLECTOR OF INTERNAL REVENUE, FOR THE DISTRICT OF GEORGIA,
Appellee.

AN APPEAL from the District Court of the United States for the Northern District of Georgia, Atlanta Division.

Joseph B. Brennan, Esq., 920 Atlanta Trust Bldg., Atlanta, Ga.

Sutherland & Tuttle, 920 Atlanta Trust Bldg., Atlanta, Ga.

Attorneys for Appellant.

Clint W. Hager, Esq., United States Attorney, Atlanta, Ga.

C. P. Goree, Esq., Assistant United States Attorney, Atlanta, Ga.

Attorneys for Appellee.

1a

PETITION.

In the District Court of the United States for the Northern District of Georgia, Atlanta Division.

Woolford Realty Company, Inc., a Corporation,
Plaintiff,
vs. No. 1246 At Law.

J. T. Rose, United States Collector of Internal Revenue for the District of Georgia,
Defendant.

To the District Court of the United States for the Northern District of Georgia, Atlanta Division.

The petition of Woolford Realty Company, Inc., a corporation, Plaintiff, names J. T. Rose as party Defendant and respectfully shows to this Honorable Court:

I.

That plaintiff is and was at all times mentioned herein a corporation organized and existing under the laws of the State of Georgia, having its principal office and place of business in the City of Atlanta, Fulton County, Georgia, residing in and being a citizen of the Atlanta Division of the Northern District of Georgia.

II.

That defendant is a citizen of the State of Georgia and resides in the City of Atlanta in the Atlanta Division of the Northern District of Georgia, and that at the time of payment of the amounts herein sought to be recovered, and at all times since the dates of such payments, defendant has been and now is Collector of Internal Revenue of the United States for the District of Georgia, in which collection district the plaintiff resides.

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III.

That this is a suit of a civil nature, arising under the laws of the United States, providing for Internal Revenue, to-wit, the Revenue Act of June 2, 1924, Ch. 234, 43 Stat. 254 and the Revenue Act of February 26, 1926, Ch. 27; 44 Stat. 10.

IV.

That the defendant is indebted to the plaintiff in the principal sum of $5,026.22 besides interest on $1,253.10 from March 15, 1928, and on $1,253.10 from June 15, 1928, and on $2,520.02 from October 9, 1929, at the rate of 6% per annum, by reason of the facts set forth in the following paragraphs:

V.

That the plaintiff owned throughout the year 1927 ninety-six per cent of the capital stock of Piedmont Savings Company, a Georgia corporation, and said corporations were affiliated within the meaning of the Revenue Act of 1926 and were entitled, under the Revenue Act of 1926 and Regulations 69, to file a consolidated return.

VI.

That on or about March 15, 1928, plaintiff and said Piedmont Savings Company filed a consolidated corporation income tax return for the calendar year 1927 showing net taxable income to plaintiff of $37,582.63 and a loss to Piedmont Savings Company of $453.80 and a combined net taxable income to the consolidated group of $37,128.83, upon which the tax was computed to be $5,012.39, which tax was in due course assessed against plaintiff.

VII.

That the income and tax of the consolidated group computed as above stated did not take into consideration statutory net losses sustained by said Piedmont Savings Company in 1925 and 1926 amounting respectively to $43,478.25 and $410.82, or a total of $43,889.07.

VIII.

That said Piedmont Savings Company actually sustained in 1925 and 1926, respectively, as reported in its Federal income tax returns for those calendar years, statutory net losses of $43,478.25 and $410.82, or a total for the two years of $43,889.07.

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IX.

That on or about May 9, 1928, plaintiff and said Piedmont Savings Company filed an amended consolidated corporation income tax return on Form 1120 showing the same items of income and expense in exactly the same amount as shown on the original return referred to in Paragraph VI above, except that it claimed as an additional deduction from consolidated income the sum of $43,889.07, being the amount of the statutory net loss of Piedmont Savings Company for 1925 and 1926. A copy of the material portions of page 1 of said return, which are the only portions of the return here material, is attached hereto and made a part hereof, marked "Exhibit A."

X.

That an Internal Revenue agent investigated the returns of plaintiff and said Piedmont Savings Company for the calendar year 1927 in May 1929 and made certain minor adjustments, which reduced the net taxable

income of plaintiff to $36,587.62 and left the loss of said Piedmont Savings Company for the calendar year 1927 unchanged, and disallowed any deduction on account of the statutory net losses of said Piedmont Savings Company for 1925 and 1926, which resulted in a consolidated net taxable income of $36,133.82.

XI.

That the Commissioner approved the adjustments made by the Revenue Agent and denied to plaintiff and said Piedmont Savings Company the right to bring forward any part of the statutory net losses in 1925 and 1926 to be deducted from or to reduce in any way the income of the consolidated group for the calender year 1927, as computed without reference to the statutory net losses of said Piedmont Savings Company for 1925 and 1926, with the result that only $134.32 of the original assessment of $5,012.39 was abated, leaving a balance of tax due amounting to $4,878.07.

XII.

That if the deduction of the net losses sustained by said Piedmont Savings Company had been allowed by the Commissioner there would have been no net income to the consolidated group and no tax would have been due by the consolidated group for the calendar year 1927.

XIII.

That plaintiff paid to the defendant herein as Collector of Internal Revenue for the District of Georgia the following amounts of taxes and interest on the dates specified:

March	15, 1928	$1,253.10	tax
June	15, 1928	1,253.10	tax
October	9, 1929	2,371.87	tax
October	9, 1929	148.15	interest

XIV.

That on or about November 8, 1929, plaintiff filed with the defendant a claim for refund of taxes, copy of which is attached hereto and made a part hereof marked "Exhibit B."

XV.

That said claim for refund was disallowed by the Commissioner on a schedule dated December 20, 1929.

XVI.

That by reason of the overstatement of the consolidated income of plaintiff and said Piedmont Savings Company, as aforesaid, and the exaction of the tax upon said overstated income, the defendant wrongfully and illegally exacted of the plaintiff the sum of $4,878.07, corporation income tax, and interest of $148.15, none of which was legally due from the plaintiff, and defendant continues to withhold said sums from the plaintiff, although he has been requested to return said sum to the plaintiff with interest thereon.

Therefore, plaintiff prays that process issue directed to the defendant requiring him to be and appeal at the next term of this Court to answer this Petition, and further prays that it have judgment of the Court against the defendant for the sum of $5,026.22, together with interest on $1,253.10 from March 15, 1928, and on $1,253.10 from June 15, 1928, and on $2,520.02 from October 9, 1929, at the rate of 6% per annum, together with all costs of this proceeding.

Respectfully submitted,
(Sgd.) W. A. SUTHERLAND,
(Sgd.) JOSEPH B. BRENNAN,
Attorneys for Plaintiff.

Of counsel:

SUTHERLAND & TUTTLE,
Atlanta Trust Company Bldg.
Atlanta, Georgia.

Filed February 18, 1930.

6 Georgia,
Fulton County.

Personally appeared before me, the undersigned attesting officer, James E. Dickey, who, being first duly sworn, deposes and says that he is Vice-President and Secretary of the plaintiff in the foregoing suit, and that as such he is familiar with the facts stated in the foregoing Petition, and that the facts stated therein are true of his own knowledge.

(Sgd.) JAS. E. DICKEY.

Sworn to and subscribed before me this 18th day of January, 1930.

(Sgd.) J. J. SIMPSON, Jr.,
Notary Public, Ga. State at
(Seal) Large.
My commission expires July 11, 1930.

(Exhibits omitted.)

7 Summons and Marshal's Return Thereon, omitted from the printed record.

* * * * * * * *

9 DEMURRER OF DEFENDANT.

(Title Omitted.)

Now comes J. T. Rose, named as defendant in the above entitled case, and for demurrer to said petition says:

(1) Plaintiff's said petition does not state a cause of action against this defendant.

(2) It appears from the facts as stated in said petition, especially in paragraphs 7, 8, 9, and 10 thereof, that the plaintiff is not entitled to recover any sum whatever from this defendant in said suit.

Wherefore, defendant prays judgment of the Court, etc.

(Sgd.) C. P. GOREE,
Assistant U. S. Attorney and
Attorney for the Defendant.

Filed May 29, 1930.

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10 OPINION ON DEMURRER.

(Title Omitted.)

Woolford Realty Company sues to recover as an overpayment income tax paid on a consolidated return for itself and Piedmont Savings Company for the year 1927. A general demurrer is enterposed. The petition and exhibits show these facts: Piedmont Savings Company, prior to 1927, was not so affiliated with plaintiff as to permit consolidated returns. The separate returns of Piedmont Savings Company for 1925 and 1926 showed net losses. The consolidated return for 1927 showed a small net loss for the Piedmont Savings Company, which was taken off the net income shown for Woolford Realty Company in fixing the consolidated tax. By an amendment of the consolidated return there were sought to be brought forward as additional deduc-

tions the net losses of the Piedmont Savings Company for 1925 and 1926, which would have canceled the net income for 1927 of Woolford Realty Company. The correctness of the denial of these deductions is the whole question here.

Section 240 of the Revenue Act of 1926 permits affiliated corporations to make consolidated returns for "any taxable year" under regulations prescribed by the Commissioner. The Regulations 69, Section 632 and following deal with consolidated returns, but make no express provision about carrying forward previous separate net losses. Section 634, relating to changes of ownership during the year, rather indicates a purpose to exclude from the consolidated return all separate business. Section 635, relied on by plaintiff, while it requires the separate deductions for each corporation to be stated, says nothing about what they shall include. Ordinarily the deductions are the same that would be shown for each corporation on a separate return. Regulation 1622, which deals with carrying forward a net loss for deduction the following year, says "It should be noticed, however, that a net loss for a preceding year may not be considered in computing a net loss for a succeeding year." This is a fair interpretation of the language of Revenue Act of 1926, Section 206(b) on the point. Since, therefore, Piedmont Savings Company made no net income in 1927, but a net loss, this previous net loss would not be considered in a separate return. In permitting consolidated returns where one corporation substantially owns the other, Congress apparently desired to recognize that the business might all be justly considered that of the parent company and its profits and losses dealt with accordingly "for the taxable year." Laying emphasis on the quoted words, and confining the period of consolidated accounting to the period of actually affiliated business, will effectuate this intent. Regulation 634 even carries it into fractions of a year. To permit a

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money earning corporation to take credit for net losses of another corporation which it has subsequently bought would not be in line with, but antagonistic to, the intent of and the reasons for the law. Whether the net losses for 1925 and 1926 would have been available if a net income had been shown by the Piedmont Savings Company after affiliation in 1927 need not be here decided. The petition sets forth no cause of action and will be dismissed.

This November 14th, 1930.

(Sgd.) SAM'L. H. SIBLEY,
U. S. Judge.

Filed November 14, 1930.

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12 JUDGMENT.

This case came on to be heard on the 8th day of November, 1930, before the Honorable Samuel H. Sibley, United States Judge, presiding, on the Demurrer to plaintiff's petition and the Court being of the opinion that the Demurrer is well taken, it is therefore considered, ordered and adjudged by the Court that the Demurrer to Plaintiff's Petition in this case be and the same is hereby sustained in all respects and that Plaintiff's Petition be and the same is hereby dismissed. It is further considered, ordered, and adjudged by the Court that the defendant have and recover of the plaintiff $....., costs of suit.

This 22d day of November, 1930.

SAM'L. H. SIBLEY,
United States Judge.

Filed Nov. 22, 1930.

13 PETITION FOR APPEAL.

To the Honorable Samuel H. Sibley, District Judge:

The above named petitioner, Woolford Realty Company, Inc., considering itself aggrieved by the judgment made and entered on the . . day of November, 1930, in the above entitled cause, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and it prays that this appeal may be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceeding, and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Fifth Circuit under the rules of such Court in such cases as may be provided.

W. A. SUTHERLAND,
JOSEPH B. BRENNAN,
Attorneys for Petitioner.

Of counsel:

SUTHERLAND & TUTTLE,
Atlanta Trust Co. Bldg.
Atlanta, Georgia.

Filed Nov. 22, 1930.

14 ORDER ALLOWING APPEAL.

Upon due consideration of the foregoing petition for an appeal, it is ordered that the appeal herein be allowed as prayed for, and it is further ordered that a certified transcript of the record and all proceedings be transmitted to the Circuit Court of Appeals for the Fifth Circuit. It is further ordered that the bond on appeal be fixed at the sum of $250.00.

This 22 day of November, 1930.

SAM'L. H. SIBLEY,
United States Judge.

Filed Nov. 22, 1930.

15 ASSIGNMENT OF ERRORS.

(Title Omitted.)

Now comes the said Woolford Realty Company, Inc., plaintiff in the above entitled cause, and files the following assignment of errors, upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause, from the judgment of this Court entered on the .. day of November, 1930.

1. The Court erred in sustaining defendant's general demurrer to the petition and by deciding that the facts stated in said petition were not sufficient to constitute a cause of action.

2. The Court erred in rendering judgment dismissing the petition.

Wherefore, plaintiff prays that the said judgment may be reversed and for such other and further relief as to the Court may seem just and proper.

Dated November 22, 1930.

W. A. SUTHERLAND,
JOSEPH B. BRENNAN,
Attorneys for Plaintiff.

Filed Nov. 22, 1930.

16 State of Georgia,
County of Fulton.

Know all men by these presents, that we, Woolford Realty Company, Inc., as principal, and Walter C. Hill, as surety, are held and firmly bound unto J. T. Rose, Collector of Internal Revenue, in the full and just sum of Two Hundred Fifty Dollars ($250.00) to be paid to the said J. T. Rose, Collector of Internal Revenue, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind

ourselves and each of us, jointly and severally, and each of our heirs, executors and administrators, by these presents. Sealed with our seals and dated this 22nd day of November, 1930.

Whereas, lately at a District Court of the United States for the Northern District of Georgia, in a suit depending in said Court, between Woolford Realty Company, Inc., plaintiff, and J. T. Rose, Collector of Internal Revenue, defendant, a judgment was rendered against the said Woolford Realty Company, Inc., and the said Woolford Realty Company, Inc., has prosecuted an appeal to the Circuit Court of Appeals for the Fifth Circuit to reverse the judgment of said District Court in the above entitled cause:

Now, therefore, the condition of this obligation is such that if the above named Woolford Realty Company, Inc., shall prosecute its said appeal to effect and answer all costs if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

WOOLFORD REALTY COMPANY, INC.,
By JAS. E. DICKEY,
Vice-President.
(Corporate Seal.)
WALTER C. HILL. (L. S.)

Sealed and delivered in the presence of:
ELLINE MARKS,
J. R. ANDREWS.

Approved by:
SAM'L. H. SIBLEY,
United States Judge.

Filed Nov. 22nd, 1930.

17 State of Georgia,
County of Fulton.

Walter C. Hill, security on the within bond, being duly sworn, deposes and says that he is worth the sum of $250.00 over and above his just debts and liabilities and exemptions under the homestead and exemption laws of the State of Georgia.

WALTER C. HILL.

Sworn to and subscribed before me this 22nd day of November, 1930.

J. R. ANDREWS,
(Notarial Seal) Notary Public.

Filed Nov. 22nd, 1930.

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18 PRAECIPE.

(Title Omitted.)

To the Clerk of the above Court:

You are hereby requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Fifth Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following and no other papers and exhibits, to-wit:

1. The original petition filed in Office of the Clerk of the District Court on the 18th day of February, 1930, with all entries thereon and exhibits thereto.

2. Defendant's demurrer filed on the 29th day of May, 1930.

3. Opinion of the Court on demurrer, filed 14th day of November, 1930.

4. Order and judgment of the Court made and entered on the .. day of November, 1930.

5. Petition for appeal, with date of filing.

6. Order allowing appeal, with date of filing.

7. Assignment of errors, with date of filing.

19 8. Citation of said petition for appeal and acknowledgment of service thereon, with date of filing.

9. This praecipe with acknowledgment of service thereon, with date of filing.

10. Certificate of the Clerk to the correctness of the record as to praecipe.

W. A. SUTHERLAND,
JOSEPH B. BRENNAN,
Attorneys for Plaintiff.

Filed.

Due and legal service of the within and foregoing praecipe is hereby acknowledged and all other and further service is hereby waived.

This 22 day of November, 1930.

C. P. GOREE,
Asst. United States Attorney.

Filed Nov: 22, 1930.

20 CLERK'S CERTIFICATE.

United States of America,
Northern District of Georgia, ss:

I, O. C. FULLER, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing and attached 20 pages contains a true, full, complete and correct copy of the original record, assignments of error, and all proceedings had in the matter of Woolford Realty Company, Inc., Appellant, versus J. T. Rose, United States Collector of Internal Revenue for the District of Georgia, Appellee, as specified in the praecipe of counsel herein and as the same remains of record and on file in the Clerk's office of the said District Court, at Atlanta, Georgia, except that the original citation with acknowledgment of service thereon is included herein in the stead of a copy thereof.

In testimony whereof I hereunto set my hand and the seal of the said District Court, at Atlanta, Georgia, this the 4th day of December, A. D. 1930.

O. C. FULLER,
Clerk, United States District Court, Northern District of Georgia.

(Seal)

Original Citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

* * * * * * * *

Minute entry of argument and submission, October 6, 1931, omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 6101

WOOLFORD REALTY COMPANY, INC., Appellant,
versus
J. T. ROSE, Collector of Internal Revenue for the District of Georgia, Appellee

Appeal from the District Court of the United States for the Northern District of Georgia

(November 13, 1931)

Before Bryan, Hutcheson, and Walker, Circuit Judges

OPINION—Filed November 13, 1931

HUTCHESON, Circuit Judge:

In 1925 the Piedmont Savings Company sustained a statutory net loss of $43,478.25; in 1926 it sustained a further statutory net loss of $410.82; it was in those years unaffiliated. In 1927 appellant and the Piedmont Savings Company having become affiliated, a consolidated return for that year was filed. This return disclosed a combined net income for that year of $37,128.83 made up of appellant's net taxable income of $37,582.63 and a loss of Piedmont, $453.80. The Commissioner because Piedmont had no net income in 1927, refused to allow appellant to deduct from the combined net income the statutory net losses of Piedmont incurred in 1925 and 1926, and carried over because of having had no net income in 1926, into the third and second year respectively. The District Judge, taking the same view, denied the claim that because of this disallowance there was an overpayment.

This appeal presents the single question whether statutory net losses, accruing to a corporation when unaffiliated,

may be used by it in a subsequent year when affiliated with another, in computing not simply its own net income, but the net income of the other member of the affiliated group. Or, putting it another way, whether the words "net income" used in Sec. 206b may mean "minus net income" or loss, so as to permit a statutory net loss to be availed of by the affiliated group not merely to the extent of reducing the amount of the net income of the corporation entitled to it on which the affiliated group must pay taxes, but of producing a loss or minus quantity which the affiliated group may use as a deduction from the net income of the other member.

Respondent insists that the whole structure of the taxing system with its emphasis upon gains and losses incurred in the taxable year by the taxpayer, "a person subject to a tax imposed by the Act," makes it plain that both losses and gains must, in order to be taken account of in a return, be the losses and gain of the persons subject to the tax, and except in the single case of Sec. 206 the amortization in prosperous years by the taxpayer incurring it of his statutory net loss, they must be the losses and gains of the taxable year. He declares that the purpose of the taxing statutes as to each person subject to the tax is as to each taxable year, to ascertain, set down and fix what taxable income has accrued to him in that year. That nowhere in the statutes is there any warrant for the view that losses incurred in one year and carried over by statute as net losses by one taxpayer, may be purchased and dealt in, or in any manner acquired by another taxpayer, and used by him as deductions against his own net income. He contends that the taxing statutes use the term "net income" in its real, its natural sense, of a plus, not a minus quantity, meaning "that portion of the receipts of a business which remains after making the deductions allowable by law from its gross income." That it is just as unthinkable to say that net income means either net loss or minus net income as to say that plus and minus are the same.

Appellant on its part insists that to permit respondent's contention to prevail would be to permit a literal construction of the words "net income" in 206b to defeat the clear purpose and intent of that section; that the deduction may be used as one of the factors in ascertaining whether the

taxpayer made a loss or gain for the year, and how much; that the result of this literal construction would be, as to this particular deduction, to deprive an affiliated corporation entitled under Sec. 240 to make a consolidated return, of the full benefit of the deductions to which each member of the group is entitled, contrary to the clear intent of Sec. 240 and the regulations and practices under it. Appellant cites generally in support of its position, the proposition first advanced by the Board of Tax Appeals in Alabama By-Products Corporation, 18 B. T. A. 919, and repeated in later decisions of the Board, that "the statutory net loss is by the plain language of the statute put in the same category as any other deduction allowed by statute in determining an operating gain or loss of one corporation in an affiliated group for the taxable year." It declares, as the Board did in Pittsburgh Gasoline Co., 21 B. T. A. 302, that in determining the net income of a corporate taxpayer the deduction of the net loss of a prior year allowed by Sec. 206 is to be treated the same as the deduction allowed by Sec. 234 whether this deduction produces a net loss, or as the Board calls it, a minus net income. Appellant cites in support of its position the opinions of the Board of Tax Appeals in Alabama By-Products Corporation, 18 B. T. A. 919; Ginsburg Co., 19 B. T. A. 81; Buckie Printers Ink Co., 19 B. T. A. 943; Pittsburgh Gasoline Co., 21 B. T. A. 297; General Box Corporation, 22 B. T. A. 725; Arrow Coal & Ice Co., 22 B. T. A. 1341; Tolerton & Warfield Co., 23 B. T. A. 892; Hawley Investment Co., 23 B. T. A. 953, and National Slag Co. vs. Comr., 47 Fed. (2d) 846.

On the face of it, a ruling which permits a corporation with a consistent record of gains, to affiliate with one having a large accumulation of statutory net losses for the purpose and with the result of using these losses in the year of affiliation as deductions from its income in that year, appears generally inappropriate to the federal scheme of income taxation, designed as it is with the sole exception of the statutory net loss provision, to make each person subject to the tax, pay taxes on his income for the year in which it accrues. The District Judge was impressed with this general inappropriateness; it impresses us. The particular inappropriateness of the contention that in using the words in Sec. 206b "shall be used as a

deduction in computing net income" Congress intended to emphasize not as the object of computation the ascertainment of the net income of the taxpayer for the purpose of determining the tax he should pay, but merely the fact that a computation was to be had for the purpose of finding out whether the taxpayer made a loss or a gain, and the setting down of this figure whether a plus or a minus one, also impresses us.

It seems to us that to give this effect to the words would be to do violence not only to the words themselves, but to the general purpose of the section, which was to give to a taxpayer which had sustained it, the purely personal right (Bush vs. Comr., 50 Fed. (2d) 800) to amortize out of earnings in the second and third years following, losses of the first year, not to give to this statutory net loss a substantive character as an asset which could be traded in through the device of affiliation, and thus, acquired by another taxpayer, used by him as a deduction against his own income.

Were it not for the fact urged upon us by appellant with such earnestness that the Board of Tax Appeals and the Circuit Court of Appeals for the Third Circuit have by construction found that the words in question do have the meaning which appellant contends for, we should take the simple view which Alice took before her encounter with the master logomachist, that words mean what they say, and not the opposite, and simply say, without more ado, that the words "net income" mean net income; they do not, they cannot mean minus net income or loss. That when Congress in Sec. 206b declared that the statutory net loss "shall be allowed as a deduction in computing the net income for the succeeding taxable year" it used these words in their natural, their ordinary sense, to mean "that portion of the receipts of a business which remains after making the deductions allowable by law from the gross income." That they were used with the practical end of taxation in view, determining the amount which the taxpayer will contribute to the support of the Government in the taxable year.

In the light, however, of the contrary view so strongly presented, it is desirable, we think, to examine the words used in the statutes relied on, both in themselves and in their context, to determine whether it is we, or the appellant, who see them through the looking-glass.

The applicable statutes and regulations on which the structure of appellant's argument rests are Rev. Act 1926,

Determination of Net Income.—"In the case of a corporation subject to the tax imposed by Sec. 230, the term 'net income' means the gross income as defined in Sec. 233 less the deductions allowed by Secs. 234 and 206."

Sec. 206 (a) and (b) provides: "(a) As used in this section the term 'net loss' means the excess of the deductions allowed by section 214 or 234 over the gross income, with the following exceptions and limitations * * * (b) If for any taxable year it appears upon the production of evidence satisfactory to the Commissioner, that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable years (hereinafter in this section called 'second year') and if such net loss is in excess of such net income (computed without such deduction) the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called 'third year')."

Sec. 240 (a). "Corporations which are affiliated * * * may for any taxable year make separate returns, or under regulations * * * make a consolidated return of net income for the purpose of this title, in which case the tax thereunder shall be computed and determined upon the basis of such return." (b) Provides that the total tax shall be computed in the first instance as a unit, and shall then be assessed upon the respective corporations as they shall agree, or on the excess of the net income properly assessable to each."

In Regulation 69 Art. 635 Consolidated Net Incomes of Affiliated Corporations, it is provided:

"Subject to the provisions covering the determination of taxable net income of separate corporations * * * the consolidated taxable net income shall be the combined net income of the several corporations consolidated. In respect of the statement of gross income and deductions a corporation filing a consolidated return must show * * * the details of the items of gross income and deductions for each corporation included in the consolidation."

Appellant supplements its contention that the words themselves simply and plainly mean that the statutory net loss shall be allowed as any other deduction is, in arriving at the result of the taxpayer's business for that year whether it is a plus or a minus quantity, by arguing that there is in neither 206b, the net loss section, nor in Sec. 240, or any regulation under either, any provision directing that this deduction be differently treated in making up consolidated returns. He declares that though no new taxpayer has resulted from the affiliation, and the individuals who compose the group are still the statutory taxpayers, the affiliated group in reality constitutes a tax unit, a quasi taxpayer, "a person subject to the tax," "whose income and capital stock are really the income and capital stock of a single enterprise." Ice Service Co. vs. Comr., 30 Fed. (2d) 230; National Slag Co. vs. Comr., 47 Fed. (2d) 846; Flanary vs. Comr., 42 Fed. (2d) 11, and that since it is the combined net income which is being sought in the case of a consolidated return, and that income is the result of the deduction from the aggregate of the gross income of all of the affiliates of their gross allowable deductions, it is to impress a too literal and arbitrary meaning upon the words "net income" as used in the net loss statute, to limit it to a plus quantity, when the same term as to all other deductions is used both in a plus and minus sense, to mean a profit or a loss.

Of course if appellant is right in its assumption that the statutory net loss deduction must be treated like any other deduction in making up a consolidated return, it is right in its conclusion that it should have had the benefit of it here. If, on the other hand as we think, this is a special deduction available only in strict accordance with the terms of the statutes which give it, appellant is wrong and it should have been disallowed.

We think the assumption of appellant and its argument in support of it overlooks the point that taxes go by years, and that though in the taxable year in question the individual corporations are still taxpayers, the business is really regarded for the purpose of taxation, as a unit, and as such subject to tax on the business of that year. Because the income on which the tax shall be paid in the taxable year, though made up of the results of the busi-

ness of each affiliate, is not the income of each individual taxpayer, but the income of the unit for that year, the Commissioner was right in allowing against the aggregate gross income of the business for that year the aggregate deductions applicable to that year. This treatment gives full effect to the purpose of the statute to allow affiliates to transact their business as freely as though they were one corporation acting through departments, with the assurance to the Government and the taxpayer alike that the taxes payable as the result of the business done by the taxable unit in that year will, without reference to the bookkeeping of the individual corporations, be paid upon the whole business done by the unit, taking into consideration all of the earnings and all of the deductions of the branches of the business, not separately but in the aggregate, just as though in that year there was no separate corporate structure, but one corporation maintaining many departments.

When, however, it is sought to extend the grant of the statute authorizing a taxpayer to offset the earnings of subsequent years against the loss of a prior year so as to confer upon an affiliated group the extraordinary privilege of deducting from its earnings actual losses, which neither it nor its affiliates incurred in the taxable year of the affiliated group, the one making this claim must be able to point to clear and unmistakable language authorizing that extension.

Apart from the nice verbal construction of Secs. 206 and 240 which supports the view that Sec. 206 may not be so extended, we think no other view consonant with the general intent and purpose of the two statutes. The view we take gives full effect to them both. It does not permit affiliation to deprive the taxpayer of his net loss privilege or in any manner diminish it. It does not permit affiliation to enlarge or in any manner change it. This personal privilege, extended to the individual taxpayer to palliate the rigidity of the annual system of taxation, and to spread over the two succeeding years for the purpose of deduction in them from the net income which the taxpayer might make in those years, losses which though not all actually accruing in the one year, were perhaps the foundation of the income of the following years, we think should be given the full effect intended. It should not be by construction

extended to the unreasonable result of permitting a corporation having no connection whatever with the losses, to avail itself of them as a positive deduction through the device of affiliation.

While appellant does find support for the position which it takes, in the opinions of the Board of Tax Appeals, we cannot agree with the view which the Board takes. Whether the decision in the National Slag Co. case supra was or not correct, it did not decide the point before us. That case merely decided that since one Buckland had during the years in which the statutory net losses were sustained, as well as during the year of affiliation, owned both of the enterprises, the loss was really his loss, and the statute should be construed so as to give him the benefit of it.

Decisions which though not directly in point, in principle support the position we take, that statutory net loss is individual to the taxpayer incurring it and may be availed of by him to the extent of his net income, are Swift vs. United States, 38 Fed. (2d) 365; The Sweets Co. of America vs. Comr., 40 Fed. (2d) 346; Burnett vs. Moore Cotton Mills, 49 Fed. (2d) 239; cf. Planters Oil Co. vs. Hopkins, 47 Fed. (2d) 659; Bush vs. Comr., 50 Fed. (2d) 800; First National Bank of Chicago vs. U. S., 283 U. S. 142.

The judgment of the Court below is affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 6101

WOOLFORD REALTY COMPANY, INC.,

versus

J. T. ROSE, Collector of Internal Revenue for the District of Georgia

JUDGMENT—November 13, 1931

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

MOTION TO STAY ISSUANCE OF MANDATE—Filed Nov. 24, 1931

Now comes Woolford Realty Company, Inc., the appellant in the above entitled cause, and shows to this Court that it intends to apply to the Supreme Court of the United States for a writ of certiorari to review the judgment rendered by this Court, and that it intends to make said application within thirty days after the time when the mandate of this Court would normally issue under Rule XXXII.

Wherefore Appellant prays that the mandate of this Court be stayed and withheld until January 3, 1932, or in the event that a petition for certiorari is filed and docketed in the Supreme Court prior to the expiration of said time, then until final disposition of the cause in the Supreme Court.

This 19 day of November, 1931.

(Signed) W. A. Sutherland, Joseph B. Brennan, Attorneys for Appellant.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER STAYING MANDATE—Filed Nov. 24, 1931

On consideration of the application of the appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed

for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 24th day of November, 1931.

(Signed) N. P. Bryan, United States Circuit Judge.

Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 25, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,396. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 582. Woolford Realty Company, Inc., petitioner, vs. J. T. Rose, Collector of Internal Revenue for the District of Georgia. Petition for a writ of certiorari and exhibit thereto. Filed December 21, 1931. File No. 36,396.